Supreme Court, U. S.
FILED
SEP 9 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1605

RICHARD NIXON, *Appellant*

v.

ADMINISTRATOR OF GENERAL SERVICES, ET AL., *Appellees,*
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., JACK ANDERSON, LILLIAN HELLMAN, ET AL., *Intervenor-Appellees.*

On Appeal from the United States District Court for the District of Columbia

---

APPELLANT'S REPLY TO THE MOTIONS TO AFFIRM

HERBERT J. MILLER, JR.
RAYMOND G. LARROCA
MARTIN D. MINSKER
WILLIAM H. JEFFRESS, JR.
R. STAN MORTENSON

MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037

Attorneys for Appellant

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1605

RICHARD NIXON, *Appellant*

v.

ADMINISTRATOR OF GENERAL SERVICES, ET AL., *Appellees*,
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
ET AL., JACK ANDERSON, LILLIAN HELLMAN, ET AL.,
Intervenor-Appellees.

On Appeal from the United States District Court for the District of Columbia

---

APPELLANT'S REPLY TO THE MOTIONS TO AFFIRM

Both the Government and the intervening parties [collectively "the appellees"] seek to avoid this Court's review—at least at this time—by requesting summary affirmance of the district court's decision. The intervening parties go so far as to state that the issues are "unsubstantial" and stress that review will delay implementation of the Act (*i.e.*, their speedy access to the materials of appellant's Presidency) (Reporters Comm. Motion to Affirm 2). The Government,

not as sanguine about the unsubstantiality of the issues, argues that they "... are not yet so squarely presented that definitive resolution by this Court is necessary or appropriate," and that "[f]urther judicial consideration of the underlying issues appellant seeks to raise should appropriately await issuance of final regulations" (Govt. Motion to Affirm 11, 12). In fact, the principal issues presented by this case are fully ripe for review and summary affirmance of the decision below would only serve to foreclose meaningful appellate consideration of the serious constitutional problems posed by the Act. Moreover, affirmance would establish as law by this Court certain holdings of the lower court the Government expressly disavows, and would defeat—because of the impossible burden of effectuating his rights under any regulatory system—those rights and privileges the lower court admitted appellant has in the seized materials.

1. The intervening appellees' statements notwithstanding, there is really no question but that the issues this Act presents are substantial and unprecedented. Congress has never before attempted to legislate the conditions under which a President's confidential files and private conversations will be published to the world. Its effort to do so here, therefore, raises the fundamental question of whether the separation of powers doctrine, which has undergird each constitutional officeholder's right throughout our history to control the internal affairs of his own office, permits legislation that directs a political appointee, subject to congressional confirmation and operating under congressionally imposed standards, to decide whether and when a President's privately recorded thoughts, opin-

ions and beliefs will be made public. The question also arises whether the purposes the Act purports to serve justify government employees reviewing intensely private and politically sensitive conversations of the kind this Court has already held are *presumptively privileged* against disclosure to even a single official of the Executive Branch. *United States* v. *Nixon*, 418 U.S. 683 (1974) (demand by Special Prosecutor held to be justiciable intra-branch dispute). This Act reverses that presumption in favor of public disclosure and substitutes a general interest in historical research for the compelling showing of need for particularized information this Court said was required to justify a breach of presidential confidentiality.

The questions this Act raises cut to the very core of the relationship between Congress and the President. While it is true that "[f]or almost two centuries these issues . . . have been left to be accommodated by the ebb and flow of political forces . . ." (Govt. Motion to Affirm 11), Congress has pressed the point by enacting this legislation. The responsibility for a definitive resolution of whether Congress possesses the power to interject itself in this fashion into the internal affairs of the Presidency rests not with a district court but with this Court.

In the same vein, appellant's claims based on personal constitutional rights under the First, Fourth and Fifth Amendments raise significant issues concerning whether such fundamental guarantees can be "outweighed" by an interest in public information about Watergate or history in general, or by other interests, such as access to material for judicial or legislative proceedings, which could and always have been accom-

modated by such legally sanctioned procedures as the subpoena process.[1] Although the legal principles underlying appellant's personal constitutional claims are by no means novel, their application to the only statute ever to seize the entire product of a man's life spanning over five years is highly novel, and the district court's strained effort to fit this Act into the mold of such legislation as the Safe Streets Act of 1968 illustrates why the lower court's decision necessitates careful review by this Court.

2. Summary affirmance of the decision below would be particularly inappropriate. Significantly, the Government's own motion provides the reason. While urging this Court to affirm the district court's

[1] The principal interest appellees rely upon to justify the Act is access to the material for current government business. The only evidence submitted by the Government concerning its needs in that regard pertains exclusively to the National Security Council (NSC) staff files, which are segregated materials comprising 403 boxes of file folders. A valid interest in that material could only support specific legislation rather than a blanket seizure of all of appellant's recorded conversations and his and his staff's political files.

Contrary to the appellees' protestations that the business of government would be impeded by appellant's retention of his tapes and papers, the record to date establishes that, apart from the Special Prosecutor's investigations, there has been *not a single instance in over two years* in which the Government has needed access to appellant's recorded conversations for current business of the Executive Branch. As for the Special Prosecutor's needs, at the time the Act was passed counsel for appellant and the Special Prosecutor were in the midst of negotiations concerning consensual production of recorded conversations relevant to his investigations. Those negotiations produced an agreement under which the Special Prosecutor requested 55 conversations. Only 16 of those contained information pertinent to his inquiries. All 55 requests were in a form equivalent to a subpoena and illustrate that the Special Prosecutor's needs—or those of any other litigant or congressional committee—could have been satisfied through recognized, legal procedures without the broad scale access provision contained in the Act.

decision, thereby making it not only the law of this case but the law binding upon all courts, the Government expressly disavows *the major premise* upon which the district court's decision rests.

The district court concluded that if a former President has sufficient interest to assert the confidentiality privilege as to the materials of his own office, his claim is entitled to "much less weight." As the court put it, "It is this less forceful claim that we consider as the basis for Mr. Nixon's challenge . . ." (Juris. St. 40a). The Government, however, informs this Court that it thinks the district court was wrong. In the Government's words:

> "The confidentiality necessary to ensure uninhibited discussion must be measured in decades. It cannot be limited to the term of office of a particular President. Such a privilege should be recognized by a court if asserted by a former President . . ." (Govt. Motion to Affirm 18-19, n.11).

Yet, it was only by deprecating the presidential privilege when asserted by a former President that the lower court was able to hold that other interests, such as historical research, "outweighed" the interest in presidential confidentiality.

This critical inconsistency between the Government's position on presidential privilege and the law established by the district court would be sufficient in itself to warrant this Court's taking this case, for it points out just how substantial and delicate are the various constitutional issues raised by this appeal. But there are several other inconsistencies and unsupportable positions which merit this Court's attention.

For example, the Government blurs the distinction between a President and his staff and the Executive Branch in general with its hundreds of agencies and thousands of employees. It suggests that appellant's presidential materials are to be merely handled "in house" and that Congress' directives concerning review and public release of the materials, so long as administered by an executive agency, are not dissimilar, for separation of powers purposes, to statutes concerning income tax returns, census data, and records of agency actions (Govt. Motion to Affirm 14). Not only does the Government fail to see the obvious distinctions other courts have recognized, (see, *e.g.*, *Soucie* v. *David*, 448 F.2d 1067, 1080-84 (D.C. Cir. 1971) (Wilkey, J., concurring); *Nader* v. *Baroody*, 396 F. Supp. 1231 (D.D.C. 1975)), but it also chooses to downplay its own admitted belief that Section 104(b) of the Act (whereby Congress retains authority to review the public access regulations) violates the separation of powers doctrine. (Govt. Motion to Affirm 16-17, n. 10.) The Government views this attempt by Congress to participate in the public access aspects of the Act as somehow distinct from the Act's overall intrusion upon the internal affairs of a President. In other words, according to the Government, Congress can set the controlling criteria for regulations concerning publication of a former President's confidential materials without breaching the separation of powers, but cannot review the proposed regulations drafted pursuant to those criteria. The distinction is without substance. Section 104(b) is merely one aspect of Congress' overall effort through this legislation to govern the release of appellant's confidential materials. It is the purported exercise of control in any form that raises the separation of powers problem.

The Government's attempted distinction of the analogy of this Act to a Judicial Materials Preservation Act presents another troubling characterization of the Presidency. Again equating the Presidency to the Executive Branch in general, the Government describes the conduct of the Nation's affairs as "a continuing process" distinguishable from Supreme Court decisions which the Government describes as "separate events."[2] While it is true that government business at the agency level continues from one administration to the next, the business and policy decisions of the President and his immediate staff change with each administration, and *no* President has ever needed—much less had—access to the political files of his predecessor.[3] Although there is little question that the seizure

[2] This argument, like that of the intervening appellees—which relies upon such factors as public accountability—ignores the fact that the principal interest advanced by this Act is historical preservation and research. That interest clearly applies to the papers of a Justice of this Court as well as to those of members of Congress. Indeed, Title II of the Act establishes a commission to consider legislation concerning the papers of members of the Judicial and Legislative Branches. Therefore, the disposition of this case—the only case ever dealing with Congress' right to control the papers and effects of a coequal branch of government—will be the only precedent to guide that commission and Congress in the enactment of such legislation. Summary affirmance would not provide the kind of guidance warranted for this incursion into the internal affairs of constitutional officeholders.

[3] The Government contends that "[t]he business of government requires that the President and executive officials have access to the papers of his predecessors, and . . . that no claim of privilege can hinder this access." (Govt. Motion to Affirm 18). The Government's assertion is much too broad and fails to distinguish between different kinds of presidential materials. If an incumbent were to seek from his predecessor's files information affecting the national security, obviously no confidentiality privilege would bar disclosure. On the other hand, if the incumbent were to demand of a former

and disclosure of the private discussions of a President concerning political matters or personalities would prove interesting to journalists and historians, there is no basis whatever for concluding that such material is essential to the legitimate needs of government.

Given the various disagreements and reservations harbored by the Government concerning the district court's holdings on issues fundamental to the structure of our political system, it would be inadvisable for this Court to affirm summarily the decision below. Summary affirmance without careful briefing and a full appreciation of the ramifications of this unprecedented Act would place this Court's imprimatur upon each district court holding essential to its decision and would foreclose subsequent analysis of the underlying constitutional issues squarely presented at this time for review.[4]

President his memoranda discussing various political choices for potential running-mates or cabinet appointees, the former President's claim of confidentiality should undoubtedly prevail. In any event, the instances in which an incumbent has sought access to his predecessor's files in the last 200 years have been so rare that the operation of the privilege in that context is of little practical significance. It is of critical importance, however, when—as in this case—the political materials of one President are to be placed in the hands of aides of another, who will then decide under congressionally imposed criteria whether they should be published to the world.

[4] This Court could, of course, remand the case without decision to the district court for consideration of the public access regulations and thus reserve the underlying constitutional issues for later review. That course, however, would merely delay resolution of the issues now fully ripe which go to the heart of the Act's constitutionality. The lower court's consideration of public access regulations would be a useless gesture and would impact severely upon the time and resources of the parties if the Act, or any portion of it such as the tape seizure provision, is an unconstitutional breach

3. The Government argues that the fundamental issues appellant raises are not ripe for review because regulations implementing the Act were not in effect and thus were not considered by the lower court in sustaining the Act's validity. It urges that review await consideration of those regulations. A not dissimilar approach was pressed upon this Court by parties in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). The statute there, like this Act, was hurriedly passed by Congress in a push for election and political reform, and several unprecedented provisions were included with little consideration of their constitutional ramifications. In addressing the "ripeness" question, this Court noted that since the time of the lower court's opinion, the Commission had issued rules and regulations and, although many of its functions remained unexercised, the date of their "all but certain exercise" was then close at hand. (*Id.* 115-17). Noting Congress' concern for "early adjudication of as many issues as possible," (a congressional concern also held with respect to this Act, see Section 105(a)) this Court proceeded to consider all aspects of the Commission's authority presented by the certified questions. (*Id.* 117.)

As in *Buckley*, implementing regulations are presently available, and the prospect of public disclosure of materials seized under the Act "is in no way hypothetical or speculative." *Regional Rail Reorganization Act Cases*, 419 U.S. 140, 143 (1974).[5] Consequently,

---

of the separation of powers or presidential privilege doctrines or appellant's First, Fourth or Fifth Amendment rights.

[5] All of the public access regulations, except for one concerning possible commercial reproduction and sale of the presidential recordings, either have been approved by Congress or have been

were this Court to consider the regulations important to its analysis of the Act's validity, full review could proceed without unnecessary delay.

The fact is, however, that the regulations are irrelevant to the underlying constitutional issues posed by the Act. Regardless of how the Administrator interprets the Act's disclosure mandate, no set of regulations can affect the fundamental constitutional question of whether Congress can order the seizure of materials of a former President and impose its own standards governing their review and public release. Any set of carefully prepared regulations would undoubtedly contain the requisite cosmetic words concerning "need for presidential confidentiality" and "unwarranted invasions of privacy." However, such regulations, in order to fulfill the Act's one pervading purpose—publication of the materials for historical research, particularly as it pertains to "Watergate"—must provide that *some* of the materials will at *some* point be disclosed generally. Any legislation mandating that result contravenes this Court's decision in *United States* v. *Nixon,* 418 U.S. 683 (1974) which held that a President's confidential deliberations are *presumptively privileged* and are subject to forced disclosure only upon a compelling showing of need for specific information. The Act reverses that presumption in favor of public release and places on appellant the burden of contesting publication of the thousands of conversations and documents he considers to be confidential. That is a burden no

agreed to informally by congressional committee staffs and the Administrator. The six informally approved regulations are expected to receive congressional action within the next several weeks. The remaining dispute between the Administrator and Congress concerns the effective date of the regulations.

President or former President could shoulder: requiring appellant to raise the confidentiality privilege, or any other right or defense in a decision-by-decision regulatory procedure is the functional equivalent of depriving him of his legitimate rights and privileges in a fashion that lacks the basic fairness required by due process of law.

The ripeness of this case for review by this Court is further illustrated by the fact that if this Court were summarily to affirm the district court's decision, an estimated staff of one hundred government personnel would begin immediately reviewing the papers of appellant and his staff, including such items as appellant's political memoranda, preliminary drafts of position papers, notes from his daughters, and his personal diaries;[6] and a staff of forty stenographers, technicians, lawyers, and archivists would begin listening to appellant's private recorded conversations, including intimate discussions with his wife and family, and candid talks with his physician, his personal attorneys and innumerable friends and associates.[7] Given these

[6] Contrary to the Government's statement in its Motion to Affirm, the materials seized under the Act contain unlabeled dictabelts of appellant's private diaries which can only be identified through aural examination. Those diaries are intimately private and were never intended for use by anyone except appellant. Moreover, because appellant's personal diaries were frequently dictated in his office, which was monitored by a voice-activated recording system, the tape recordings seized under the Act duplicate a large percentage of his private diary.

[7] The appellees rely heavily on the argument that the invasion of appellant's privacy is insignificant because the review of his papers and personal conversations will be conducted by "discreet archivists" who have been trusted with the papers of other former Presidents. However, each of the six former Presidents who have established libraries for their materials, personally or through close

circumstances, appellant's claim that the Act indiscriminately seizes his tapes, diaries and files in violation of his right of privacy is unquestionably ripe.[8]

---

aides, have screened their more sensitive files before any archival processing. Nor did President Johnson or President Kennedy's family permit archivists to review their privately recorded conversations. Moreover, never before has the Archives used one hundred employees to catalogue a President's materials. But even if the number of persons reviewing appellant's private conversations and papers were not so great, it is fatuous to suggest that there will be no public exposure of confidential material. Various members of the Special Prosecutor's staff, and one former Special Prosecutor, after leaving that office have discussed or written about appellant's confidential conversations, conversations of the kind this Court instructed a trial judge to treat with utmost deference. It is naive to assume that archival employees will be any more careful not to breach the confidentiality of appellant's conversations.

[8] Appellees contend that appellant's interests pertain to no more than one percent of the material. By quantitatively minimizing appellant's rights through this supposed 99 to 1 ratio, appellees seek somehow to downplay, and thus, apparently, to justify the intrusion upon appellant's privacy and presidential confidentiality.

The fact that Mr. Nixon has an intimate interest in only a "small percentage" of the millions of pages of material is irrelevant. The recordings of appellant's personal conversations seized under Section 101(a) are clearly distinct from the documentary material and include over three years of appellant's private conversations which occurred frequently each day with his family and staff, and often with visiting government officials and friends. Thus appellant's legitimate rights and privileges pervade all of the recordings. And the lower court's failure even to consider the possibility of invalidating only the tape seizure provision of the Act (Section 104(a), which is severable under Section 105(b)), was in error. Moreover, to peg appellant's interests in his own files to some 200,000 documents he personally reviewed does not account for the volumes of follow-up memoranda of conversations, notes or other material generated by close advisors, staff and others which were routinely prepared without his review and under the assumption that they would remain confidential at his discretion, as had the materials of past Presidents.

In sum, the appellees cannot bury the substantial interest of appellant in the seized materials by pointing to an estimated 7.3 million pages of children's letters, birthday greetings, public opinion mail and GPO publications, and 11.4 million pages of files containing various types of communications among executive departments which are duplicated in the files of the corresponding agencies. The fact that the Act seizes such mountains of general material as well as a contrastingly smaller percentage of sensitive items does nothing to bolster its constitutionality.

CONCLUSION

This Act represents a drastic departure from the two-hundred-year practice that has existed because of the unique relationship among the three branches of government. The tradition of Presidents and all other constitutional officeholders controlling the materials of their offices did not arise by happenstance. It is a practice with vital underlying justifications, and Congress' decision to disregard that tradition and to infringe upon the rights and privileges it embodies deserves careful scrutiny by this Court. The fact that Congress acted precipitously in a time of passion makes this Court's review of the Act even more essential. Probable jurisdiction should be noted and the case set for argument.

Respectfully submitted,

HERBERT J. MILLER, JR.
RAYMOND G. LARROCA
MARTIN D. MINSKER
WILLIAM H. JEFFRESS, JR.
R. STAN MORTENSON

MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

Attorneys for Appellant